

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION
 :
 ERIC ROBERT RUDOLPH, : NO. CR-00-S-422-S
 :
 Defendant : :

**UNITED STATES' WITHDRAWAL OF ITS MOTION FOR ISSUANCE OF
RULE 17(c) SUBPOENA**

Comes now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney for the Northern District of Alabama, and Michael W. Whisonant, Assistant United States Attorney, and withdraws its Motion for Issuance of Rule 17(c) Subpoena as follows:

When the United States advised during the October 15, 2003, status conference that it intended to review the recordings of Rudolph's telephone conversations at the Jefferson County Jail, the government's intent was not to ask the Court's permission to listen to the recordings. Rather, the government wished to afford notice to the Court and Defendant of the government's purpose in reviewing the recordings. During the status conference, however, Defendant argued that the United States

should be required to file a motion on this issue, and the Court directed the government to do so. Tr. of October 15, 2003, Status Conference, at 39-40. The United States then filed the present Motion for a Rule 17(c) subpoena, believing that this was an available procedural device for the Court to address the matter.

Without prior knowledge of the subject matter of the recorded conversations, however, it will be difficult for the United States to satisfy the particularity requirement necessary to obtain a pre-trial Rule 17(c) subpoena. See United States v. Noriega, 764 F. Supp. 1480, 1492-93 (S.D. Fla. 1991). This places the United States in the difficult position of seeking judicial approval in a situation where, as summarized briefly below, no such authorization is required to listen to the tapes.

The United States therefore withdraws its request for a Rule 17(c) subpoena without prejudice to renew the request at a later time if appropriate. The United States maintains that, under the statutory and constitutional law governing the recording of an inmate's telephone conversations, the approval or imprimatur of the Court is simply not a prerequisite to the government's review of the recorded conversations. Given the present posture of this issue, however, the United States will file a notice with the Court before the prosecution reviews the contents of Rudolph's recorded telephone conversations at the Jefferson County Jail, in order to allow Defendant to take any actions he believes are appropriate.

Notwithstanding Defendant's position in his Response Brief, the review by agents of an inmate's recorded telephone calls presents an unremarkable example of law enforcement seeking to review potential evidence that lawfully is in the hands of a third party. In most circumstances, the review of recordings of an inmate's telephone conversations is, in legal terms, the equivalent of reviewing a consensually recorded conversation made in a place where no privacy interests exist. As such, the review is not forbidden or otherwise restricted either by statutory or constitutional provision.

First, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. §§ 2510-2522 ("Title III"), does not apply where a party to the conversation has either impliedly or expressly consented to an interception of his telephone conversations. 18 U.S.C. § 2511(2)(c). Courts thus uniformly have held that, when an inmate uses a jail telephone system with actual or implied notice of monitoring by jail officers, the inmate consents to the recording of his conversations and Title III has no application. United States v. Hammond, 286 F.3d 189, 192-93 (4th Cir. 2002); United States v. Footman, 215 F.3d 145, 154 (1st Cir. 2000); United States v. Workman, 80 F.3d 688, 692-94 (2d Cir. 1996); United States v. Van Poyck, 77 F.3d 285, 292 (9th Cir. 1996); United States v. Valencia, 711 F. Supp. 608, 610-11

(S.D. Fla. 1989).¹ The Tenth Circuit took the consent analysis a step further in a recent unpublished opinion, and found that a defendant consented to monitoring even in the absence of a sign posted near the telephone or a notice in an orientation booklet when: (a) the defendant's extensive criminal history showed that he was familiar with detention settings; and (b) he had been housed earlier in another "pod" where signs advising of monitoring were posted near the telephones there. United States v. Gangi, 2003 WL 191367, at *4 (10th Cir. Jan. 29, 2003) (unpublished) (attached as Ex. A).

As summarized in the United States' Motion for Issuance of a Rule 17(c) Subpoena, Rudolph was advised in writing when he entered the Jefferson County Jail that his telephone calls were subject to monitoring.²

¹ The scope of the consent is not limited to review of the recordings by jail officials, and arguments claiming such a limitation have been rejected by the courts. United States v. Noriega, 764 F. Supp. 1480, 1491-92 (S.D. Fla. 1991); United States v. Correa, 220 F. Supp. 2d 61, 64 (D. Mass. 2002).

² In its Motion, the United States represented that, each time Rudolph picked up the telephone to make an outgoing call, he heard a recorded advisory stating that the calls were being monitored by prison staff. Counsel for the government has learned that, due to an error, this advisory was not played on Rudolph's telephone until approximately November 11, 2003. It further is counsel's understanding that, when Rudolph first was housed at Jefferson County Jail, the Justice Department had directed that the recordings of Rudolph's telephone conversations be monitored by the U.S. Marshal or its designee for security reasons. Although counsel now understands that the recorded conversations have not yet been reviewed in this manner, such monitoring of past and future calls may impact the United States' ability to satisfy the particularity requirement of a Rule 17(c) subpoena.

Similarly, the recording of an inmate's telephone calls does not implicate any constitutionally protected privacy interests held by the inmate. As with the consent exception to Title III, courts uniformly have held that an inmate cannot claim a reasonable expectation of privacy under the Fourth Amendment when making outgoing telephone calls from the jail. These cases follow two analytical paths. The first group of cases holds that, notwithstanding any notice provided to the inmates, there simply is no reasonable expectation of privacy in outbound telephone calls made from a prison. Van Hoyck, 77 F.3d at 291; Gangi, 2003 WL 191367, at **5.

Other courts hold that any reasonable expectation of privacy is extinguished when the circumstances show a prisoner's actual or implied consent to monitor his conversations. Friedman, 300 F.3d at 123. "[A]lthough pretrial detainees may have some residual privacy interests that are protected by the Fourth Amendment, the maintenance of prison security and the preservation of institutional order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." Id. (quoting United States v. Willoughby, 860 F.2d 15, 21 (2d Cir. 1988) (internal quotation marks omitted)). Accordingly, "there can be no doubt that [the inmate] had no reasonable expectation of confidentiality in his third-party conversations, as the various notices

and the consent form all explicitly stated that these calls were subject to monitoring and recording.” Noriega, 764 F. Supp. at 1492.

Accordingly, the recordings of an inmate’s telephone calls typically enjoy no statutory or constitutional protections and are, in legal terms, the equivalent of a defendant’s consensually recorded statements in the possession of a third party. Under such circumstances, if the third party consents, law enforcement officers may listen to the recordings or even take possession of them. United States v. Correa, 220 F. Supp. 2d 61, 66 (D. Mass. 2002) (finding that investigators’ review of recorded conversations even without a subpoena was acceptable under Title III, and was not a ground for suppressing the tapes at trial). Similarly, federal officers may listen to the recordings of Rudolph’s telephone calls so long as the United States Marshals Service and/or the Jefferson County Sheriff’s Department provide their consent.³

Notwithstanding the lack of a need for Court approval, the United States is cognizant of the present posture of this issue and the Court’s instructions during the

³ It is anticipated that, given the many cases (including Noriega) that involve the use of a subpoena to obtain the recorded conversations, Defendant will argue that a subpoena is required to review or obtain the tapes. No published case, however, holds that a subpoena is required. To the contrary, cases such as Correa demonstrate that a subpoena is not required to listen to the recordings if the party in possession of the recordings consents to review by law enforcement. 220 F. Supp. 2d at 66. In Noriega, for example, the court simply concluded that, if the United States opts to obtain a pre-trial Rule 17(c) subpoena, the subpoena should first be approved by the court.

October 15, 2003, status conference. Although the government is withdrawing its request for a pre-trial Rule 17(c) subpoena, it will file notice with the Court before the prosecution endeavors to review any of the recordings of Rudolph's telephone conversations at Jefferson County Jail. In this way, Defendant will be afforded the opportunity to take any actions he deems appropriate before this review is undertaken.

Respectfully submitted this the 30th day of December, 2003.

ALICE H. MARTIN
UNITED STATES ATTORNEY

A handwritten signature in black ink, appearing to read "M. W. Whisonant", written in a cursive style.

MICHAEL W. WHISONANT
ASSISTANT U.S. ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same this date by First Class, United States mail, postage prepaid, to his attorneys of record, Mr. Richard Jaffe and Ms. Judy Clark, care of Jaffe, Strickland & Drennan, 2320 Arlington Avenue, Birmingham, Alabama 35205 and Mr. William Bowen, White, Dunn & Booker, 2025 3rd Avenue North, Suite 600, Birmingham, Alabama 35203.

A handwritten signature in black ink, appearing to read "Michael W. Whisonant". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

MICHAEL W. WHISONANT
Assistant United States Attorney